Bail Slip

The Petitioner/Accused namely K. Vijayan was directed to be released on bail as per order of this Court dated 10.9.03 in Crl.M.P.No.8602/03 in Crl.R.C.NO.1398/2003.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.04.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CRL.R.C.NO.1398 OF 2003

K.Vijayan .. Petitioner/accused

-vs-

Appukutti .. Respondent /complainant

This Revision is filed u/s 397 & 401 of Cr Pc against the Judgment of the learned Additional District and Sessions Judge (Fast Track Court) Vellore in C.A.No.96 of 2002 dated 29.8.2003 confirming the order passed in C.C.No.70 of 1999 dated 23.10.2002 by the learned Judicial Magistrate No.2,Wallaja .

For petitioner :: Mr.R.C.Paul Kanagaraj

For respondent :: No appearance

O R D E R

This revision has been preferred against the Judgment in C.A. No.96 of 2002 on the file of the Additional District and Sessions Judge(Fast Track Court), Vellore .

2) A private complaint was filed under Section 200 Cr.P.C. Against the accused for an offence under Section 138 of Negotiable Instruments Act 1881 on the ground that the cheque drawn by the accused for a sum of Rs.2,37,000/- in favour of the complainant on 10.10.1998 in order to discharge a hand loan of Rs.2,37,000/- borrowed,on the same day, when presented for collection in the State Bank of India, Ranipet branch on 25.1.1999, the same was returned with an endorsement " Refer to drawer". Ex P1 is the cheque dated 10.10.1998 for Rs.2,37,000/- drawn by the accused in favour of

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the complainant. Ex P2 is the memo issued by the State Bank of India ,Ranipet branch informing the complainant that the cheque was returned with an endorsement"Referred to drawer" The complainant had issued a notice to the accused as contemplated under Section 138(2) of Negotiable Instruments Act 1881. Ex P3 is the copy of the notice. The said notice was returned by the postal authorities stating that "not claimed" on 18.2.1999. Ex P4 is the returned cover.Ex P5 is the postal receipt.The said private complaint was taken on file by the learned Judicial Magistrate No.2, Wallaja, Vellore District in C.C.No.70 of 1999 and on appearance of the accused on summons, copies under Section 207 Cr.P.C were furnished to the accused and when the offence was explained to the accused and questioned the accused pleaded not guilty.

3) On the side of the complainant P.Ws 1 to 3 were examined. Exs P1 to P5 were exhibited.

4) P.W.2 is the branch Manager of State Bank of India,Ranipet branch, wherein the complainant is having his account. He would state that Ex P1 cheque dated 24.1.1999 was forwarded to Indian Overseas Bank, Sipcot Branch for collection but the same was returned by the said Bank with an endorsement"referred to drawer" on 26.1.1999.

5) P.W.3 is an Assistant in the Indian Overseas Bank, Sipcot branch wherein the accused is having account . According to P.W.3, Ex P1 cheque leaf was issued by their Bank in favour of the accused and the said cheque was forwarded from State Bank of India, Ranipet branch on 25.1.1999 for collection, the same was returned with an endorsement "referred to drawer".

6) When incriminating circumstances were put to the accused, the accused would totally deny his complicity with the crime.

7)After going through the oral and documentary evidence, the learned trial Judge has held that the accused is guilty under Section 138 of Negotiable Instruments Act 1881 and convicted and sentenced him to six months rigorous imprisonment and a fine of Rs.5000/- with default sentence. The learned trial Judge has further awarded compensation of Rs.4,000/- from out of the fine amount of Rs.5000/- under Section 357(1) Cr.P.C. Aggrieved by the findings of the learned trial Judge, the accused had preferred an appeal in C.A.No.96 of 2002 before the learned Additional District and Sessions Judge(Fast Track Court) Vellore. The first appellate Judge, after due deliberation to the submissions made by both counsels and after going through the judgment of the learned trial Judge and after scanning the evidence both oral and documentary has ultimately concurred with the findings of the learned trial Judge, thereby dismissing the appeal. Aggrieved by the findings of the

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learned first appellate Judge the accused has preferred this revision.

8) Now the point for determination in this revision is whether the findings of the first appellate Court requires any interference from this Court?

9) Heard Mr.R.C.Paul Kanagaraj, learned Counsel for the revision petitioner.

10) The point:
The learned counsel appearing for the revision petitioner would contend that Ex P1 cheque was returnend by the State Bank of India, Wallaja, with an endorsement" Referred to drawer". But there is no evidence let in on the side of the complainant to show that the drawer of the cheque viz., the accused had no sufficient funds in his account. In this regard, it is pertinent to note the evidence of P.W.3 who is an assistant of Indian Overseas Bank, Spicot branch wherein, the accused is having his account. P.W.3 in categorical terms would say that "referred to drawer" means, there is no sufficient amount in the account of the customer. So it is clear that knowing fully well, that he has no sufficient money in his account the accused had drawn Ex P1 cheque in favour of the complainant which squarely attracts an offence under Section 138 of Negotiable Instruments Act 1881. Under Section 139 of the Negotiable lInstruments Act 1881 presumptioon will be only for a valuable consideration, the cheque was drawn by the drawer/accusued in favour of the payee/complainant.

11) The learned counsel would further contend that there was no sufficient service of notice to the accused but the endorsement in Ex P4 returned postal cover" not claimed return to sender" will amply prove that since the accused had refused to receive the notice, it was sent to the sender. Under such circumstances, I do n ot find any reason to interfere with the findings of the first appellate Court that the case under Section 138 of Negotiable Instruments Act 1881 has been made out against the accused. Under such circumstances, conviction against the accused in C.C.No.79 of 1999 is to be confirmed.

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12) When coming to the question of sentence, the principles laid down in Goa Plast (P) Ltd.v.Chico Ursula D'Souza (2004) 2 Supreme Court Cases 235) is worth mentioning. The exact observation in the said case runs as follows:

> "Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption.

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This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure creditability in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment, it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd., v. Kuchil Kumar Nandi(1998)3 SCC 249). On same facts is the decision of this Court in Ashok Yeshwant Baddave.v. Surendra Madhavrao Nighojakar. (2001)3 SCC (cri) 726). The decision in Modi case (1998)3 SCC 249) overruled an earlier decision of this Court in Electronics Trade and Technology Development Corpn Ltd., v.Indian Technologists & Engineers (Electronics) (P) Ltd., which had taken a contrary view. We are in respectful agreement with the view taken in Modi case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.". . . . . There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving

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that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability.". . . . . We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138 , as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act. The object and the ingredients under the provisions, in particular Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament,in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee"

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After holding that the accused is guilty under Section 138 of the Negotiable Instruments Act 1881, the Honourable Apex Court have disposed of the appeal by awarding twice the amount of the cheque ie., Rs.80,000/- as compensation to the appellant/complainant with default sentence giving a months time for payment. If we follow the same yardstick here in this case also, the accused is liable to pay Rs.4,74,000/- to the complainant. The point is answered accordingly.

13. In the result, the revision is dismissed with the following modification.

The revision petitioner/accused shall pay a sum of Rs.4,74,000/- (Rupees four lakhs and seventy four thousand) only towards compensation to the complainant in default to suffer simple imprisonment for six months instead 6 months RI and fine of Rs.5000/- with default sentence. Time for payment three months from today.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

sg

To

1. The Additional District and Sessions Judge(FTC) Vellore.
2. Do Thro The Principal District Judge, Vellore.
3. The Judicial Magistrate NO.2,Wallaja.
4. Do Thro The Chief Judicial Magistrate, Vellore.

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